No. 96-1037

In The

Supreme Court of the United States

October Term, 1996

THE KIOWA TRIBE OF OKLAHOMA,

Petitioner,

vs.

MANUFACTURING TECHNOLOGIES, INC., an Oklahoma corporation,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals, Division I, for the State of Oklahoma

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is an Indian Tribe immune from suit arising out of default on a promissory note given to secure economic development outside of tribal territory?

STATEMENT OF INTERESTED PARTIES

Respondent, Manufacturing Technologies, Inc., does not have a parent company and has no wholly owned subsidiaries.

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Respondent requests that the Court deny the Petition for Writ of Certiorari filed by Petitioners and submits the following in Response:

STATEMENT OF THE CASE

The Promissory Note (the "Note") sued on was given by Petitioner as consideration for the purchase of shares of stock of Clinton-Sherman Aviation, Inc., an Oklahoma business corporation, from Respondent.

The Note was executed and delivered to Respondent in Oklahoma City and performance (payment) was to be made to Respondent at its business address in Oklahoma City. The sole reason for acquisition of the stock of Clinton-Sherman Aviation, Inc., was for business development for the Petitioner.

No payments were ever made by Petitioner on the Note. Suit was filed by Respondent in the District Court for Oklahoma County. Petitioner asserted that it was immune from suit because of its sovereignty. Judgment was rendered in favor of Respondent. The Oklahoma Court of Appeals, Division 1, affirmed the Judgment of the Trial Court, and the Oklahoma Supreme Court denied certiorari to Petitioner.

REASONS FOR DENYING THE WRIT

I.

THE OKLAHOMA COURT OF APPEALS DECISION IS NOT IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT RESTRICTING TRIBAL IMMUNITY FROM SUIT FOR COMMERCIAL ACTIVITIES CONDUCTED OUTSIDE TRIBAL LANDS.

Petitioner claims tribal immunity to suit unless such immunity is waived by the Tribe or Congress has authorized

such suit. This claim is unduly broad, is in conflict with the decisions of this Court, and is not applicable in this case.

Mr. Justice Frankfurter reviewed the evolution of retention of federal authority over Indian Lands and activities in *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962). He states, at pages 72, 74, 75:

> The general notion drawn from Chief Justice Marshall's opinion in *Worcester v. Georgia*, 6 Pet 515, 561, 8 L. Ed. 483; 501; . . . that an Indian reservation is a distinct nation within whose boundaries state law cannot penetrate, has yielded to closer analysis when confronted, in the course of subsequent developments, with diverse concrete situations. By 1880 the Court no longer viewed reservations a distinct nation. On the contrary, it was said that a reservation was in many cases a part of the surrounding State of Territory, and subject to its jurisdiction except as forbidden by federal law. . . .
>
> The applicability of state law, we there said, [*Williams v. Lee*, 358 U.S. 217, 795 S. Ct. 269, 3 L. Ed. 2d 251] depends upon "whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." 358 U.S. at 220. . . .
>
> But State regulation of off-reservation fishing certainly does not impinge on treaty-protected reservation self-government, the

> factor found decisive in *Williams v. Lee*, 358 U.S. 217.

This Court considered the right of New Mexico to tax a tribal business enterprise conducted off reservation in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). The Court says, at pages 148, 149, 156:

> But tribal activities conducted outside the reservation present different considerations. "State authority over Indians is yet more extensive over activities . . . not on any reservation." *Organized Village of Kake*, *supra*, 369 U.S. at 75, 82 S. Ct. at 571, 7 L. Ed. 2d 573. Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State. See, e.g., *Puyallup Tribe v. Department of Game*, 391 U.S. 392, 398, 88 S. Ct. 1725, 20 L. Ed. 2d 689 (1968); *Organized Village of Kake*, *supra*, 369 U.S. at 75-76, 82 S. Ct. at 570-571, 7 L. Ed. 2d 573; *Tulee v. Washington*, 315 U.S. 681, 683, 62 S. Ct. 862, 863, 86 L. Ed. 1115 (1942); *Shaw v. Gibson-Zahniser Oil Corp.*, 276 U.S. 575, 48 S. Ct. 333, 72 L. Ed. 709 (1928); and *Ward v. Race Horse*, 163 U.S. 504, 16 S. Ct. 1076, 41 L. Ed. 244 (1896). That principal is as relevant to a State's tax laws as it is to state criminal laws, see *Ward v. Race Horse*, *supra*, at 516, 16 S. Ct. at 1080, 41 L. Ed. 244, and applies as much to tribal ski resorts as it does to fishing enterprises. See *Organized Village of Kake*, *supra*.

> This Court has repeatedly said that tax exemptions are not granted by implication. . . . It has applied that rule to taxing acts affecting Indians as to all others. . . . Here, the rights and land were acquired by the Tribe beyond its reservation borders for the purpose of carrying on a business enterprise as anticipated by § 476 and 477 of the (Indian Reorganization) Act. (citations omitted) These provisions are designed to encourage tribal enterprises "to enter the white world on a footing of equal competition.". . . In this context, we will not imply an expansive immunity from ordinary income taxes that businesses throughout the State are subject to. We therefore hold that the exemption in §465 does not encompass or bar the collection of New Mexico's nondiscriminatory Gross Receipts Tax and that the Tribe's ski resort is subject to that tax. . . .

The Kiowa Tribe entered into an agreement to purchase the capital stock of Clinton Sherman Aviation, Inc., from Respondent, and gave in consideration its Promissory Note. This transaction was a commercial venture and did not relate to tribal lands, or ventures conducted on tribal lands. Respondent submits that Petitioner is subject to "non-discriminatory state law otherwise applicable to all citizens of the state." *Mescalero Apache Tribe,* 411 U.S. at 148, 149.

Mr. Justice Stevens, especially concurring in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 515 (1991) says:

> . . . I am not sure that the rule of tribal sovereign immunity extends to cases arising from a tribe's conduct of commercial activity outside its own territory, cf. 28 U.S.C. § 1605(a) ("A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . (2) in which the action is based upon a commercial activity carried on in the United States by a foreign state. . .).

The New Mexico Supreme Court has so held in *Padilla v. Pueblo of Acoma*, 754 P.2d 845 (N.M. 1988), *cert. denied,* 490 U.S. 1029 In that case the New Mexico Supreme Court held that the Pueblo was not immune from suit in state court brought by a contractor for work done on an off-reservation location.

The Oklahoma Supreme Court relied on *Padilla v. Pueblo of Acoma, supra,* in determining the right of the tribe to claim immunity in its off-reservation economic activities in *Hoover v. Kiowa Tribe of Oklahoma*, 909 P.2d 59 (Okl. 1995), *cert. denied,* 116 S. Ct. 1675. At page 62:

> The New Mexico Court held that the exercise of jurisdiction over a sovereign Indian tribe for off-reservation conduct was solely a matter of comity. That court reasoned that since it was the policy of New Mexico to allow breach of written contract actions against the state, the district court may exercise jurisdiction over an Indian tribe engaged in activity off of the reservation for breach of contract., The New Mexico court cited *Nevada v. Hall*, 440 U.S. 410, 99 S. Ct. 1182, 59 L. Ed. 2d 416 (1979) for the

> proposition that even though a sovereign may not be sued in its own courts without its consent, that doctrine does not necessarily support a claim of immunity in another sovereign's courts. The Supreme Court of the United States held that there was no constitutional provision that prohibits a state's exercise of jurisdiction over sovereign sister state. *Nevada*, 440 U.S. at 426, 99 S.Ct. at 1191. "Therefore, the policy of a state to refrain from the exercise of jurisdiction over a sister state is solely a matter of comity." *Padilla*, 754 P.2d at 850. . . .

Since Oklahoma also permits an action for breach of contract against the State, the Oklahoma Supreme Court found the reasoning of the New Mexico court persuasive, and found the Kiowa Tribe liable for suit in state court on a promissory note in an economic development transaction.

Cases cited by Petitioner, such as *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), an action brought by a tribal member against the tribe to determine tribal membership, clearly fall within the claim of tribal sovereign immunity.

It is clear that the State of Oklahoma has jurisdiction over the indian tribe and over the subject matter of the action. There is no need for an express waiver of immunity from suit when the Tribe engages in an off-reservation commercial venture.

II.

THE TRIBE SUBJECTED ITSELF TO NON-DISCRIMINATORY STATE LAW APPLICABLE TO ALL CITIZENS WHEN IT WENT OUTSIDE TRIBAL LANDS IN A COMMERCIAL VENTURE.

This Court has, in the recent case of *United States v. Winstar Corporation*, __ U.S. __, 116 S. Ct. 2432 (1996) reviewed the questions of waiver of governmental immunity and the enforceability of contractual obligation of governmental entities engaging in commerce. In that case the Court held enforceable a contract entered into by a governmental entity, even though the entity was later barred from honoring its agreement by a regulatory change.

The Court considered the application of the "unmistakability doctrine," which holds that the contract with a governmental entity remains subject to sovereign jurisdiction unless such sovereignty is surrendered in unmistakable terms. The Court says, at page 2464:

> An even more serious objection is that allowing the Government to avoid contractual liability merely by passing any "regulatory statute," would flaunt the general principle that, "[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.

Mr. Justice Breyer, in his concurring opinion, states at page 2473:

> The Court has often said, as a general matter, that the "rights and duties" contained

> in a government contract "are governed generally by the law applicable to contracts between private individuals.

And further, at page 2473:

> *Murray v. Charleston*, 96 U.S. 432, 445 (1878), "(a government contract "should be regarded as an assurance that [a sovereign right to withhold payment] will not be exercised. A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity"); *New Jersey v. Yard*, 95 U.S. 104, 116-117(1877) . . . .

Petitioner complains that this case is but one of several in which judgment exceeding $1,500,000 have been taken against the Tribe, and that collection of these judgments have resulted in the seizure of tribal funds. These issues are outside certiorari jurisdiction. The Court cannot consider issues outside those presented in the Petition for Certiorari. *Yee v. Escondido*, 503 U.S. 519, 535 (1992); Supreme Court Rule 14.1(a).

This issue was also addressed by Justice Breyer in *United States v. Winstar,* 116 S. Ct. at 2475, 2476. The government there argued that an award of damages against the government carries the danger that future regulatory actions will be deterred.

> But this rationale has no logical stopping point. See, e.g., *United States Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 24 (1977) ("Any financial obligation could be regarded in theory as a relinquishment of the State's spending power, since money spent to repay debts is not available for other purposes. . . .

> Notwithstanding these effects, the Court has regularly held that the States are bound by their debt contracts"). It is difficult to see how the Court could, in a principled fashion, apply the Government's rule in this case without also making it applicable to the ordinary contract case (like the hypothetical sale of oil) which, for the reasons explained above, are properly governed by ordinary principles of contract law. To draw the line - i.e., to apply a more stringent rule of contract interpretation - based only on the amount of money at stake, and therefore (in the Government's terms) the degree to which future exercises of sovereign authority may be deterred, seems unsatisfactory. As the Government acknowledges, see Brief for Petitioner 41, n. 34, this Court has previously rejected the argument that congress has "the power to repudiate its own debts which constitute 'property' to the lender, simply in order to save money." *Bowen*, *supra*, at 55 (citing: *Perry*, 294 U.S., at 350-351, and *Lynch*, 292 U.S., at 576-577).

The Petitioner complains that it will be forced to reduce tribal governmental operations if it is required to pay damages for its breached promises to pay. This argument is answered fully by *Winstar*, *supra,* and the cases cited there.

CONCLUSION

For the reasons cited herein, this Court should deny the writ of certiorari.

Respectfully submitted,

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